

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 7, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1378**

**Cir. Ct. No. 2011GN74**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF  
JAMES D.:**

**WOOD COUNTY HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**v.**

**JAMES D.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Wood County:  
GREGORY J. POTTER, Judge. *Reversed.*

¶1 SHERMAN, J.<sup>1</sup> James D. appeals an order of the circuit court continuing his protective placement under WIS. STAT.ch. 55 (2011-12). James contends that the evidence was insufficient to support the court's decision. I agree.

### BACKGROUND

¶2 In January 2012, James, who has a history of substance abuse, alcohol-induced dementia and anxiety, was adjudged to be incompetent and was protectively placed under WIS. STAT. ch. 55 in a residential care facility. An annual review of James's protective placements pursuant to WIS. STAT. § 55.18 was conducted in late 2012.

¶3 In the County's written evaluation of James on review, the County stated that James continued to require protective placement. The County stated that James continues to need twenty-four hour care and supervision, and that he requires assistance with his medications, appointments and "some cueing with his personal cares." The guardian ad litem (GAL) appointed to James also recommended that James continue to be protectively placed in a residential home.

¶4 A hearing on James's continued protective placement was held before the court. Prior to the hearing, James was evaluated by Terri Sersch and Dr. Stuart Waltonen, a psychologist. Sersch, who was ordered by the court to assess James's physical, mental and social conditions and to consider James's service needs, recommended that James continue to be protectively placed. Sersch

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

stated in his report that James is incapable of caring for himself such that there is a substantial risk of him causing harm to himself due to alcohol-induced dementia, “which impairs his ability to recognize his need for care and the judgment to act in his own best interest.” Sersch further stated that James’s disability is permanent or likely to be permanent “due to the progressive nature of dementia and the permanence of [James’s] paralysis.” Waltonen, who conducted a medical evaluation of James, opined in his report that James is: severely impaired in terms of his sensory or motor functioning (he is wheelchair-bound); moderately impaired with respect to his attention/concentration, as well as with regard to his emotional and behavioral functioning; and mildly impaired with regard to his memory. Waltonen opined that James is not incapacitated as a result of his impairments and he opined that James is able to make decisions for himself independently. Waltonen did not offer an opinion in his report regarding James’s need for continued protective placement.

¶5 At the hearing, testimony was received from Waltonen, James’s son, Jason D., and James’s social worker, Katrina Miloch. However, no exhibits were received into evidence.

¶6 Waltonen testified that he was unable to diagnosis James with a persistent mental illness. Waltonen also testified that at the time of his evaluation of James, he did not have records of James’s prior evaluation nor detailed information on James’s prior history, including his history of substance abuse. Waltonen testified that in situations where he does not have information to help him understand what is happening, he “err[s] on the side of being conservative,” and in James’s case, because he was “in the dark” with regard to James’s prior history, he could not diagnose James with a persistent mental illness. Waltonen also testified that during his evaluation of James, James demonstrated “a

significant amount of anxiety,” which Waltonen stated “interfered with [his] ability to ... obtain a real reasonable assessment of [James’s] memory function,” and which “called into question” the “validity” of the evaluation.

¶7 Jason testified that James’s alcoholism had grown progressively worse over the last fifteen years, and that prior to James’s protective placement, James’s living conditions had been deplorable. Jason testified that James contacted the police “numerous” times because he lacked food or because he had fallen out of the wheelchair, and Jason testified that James’ last independent residence had to be “completely gutted ... due to damage [caused by James’s] wheelchair, fecal material in all of the furniture, the flooring, unidentified other things, staining, clothing, walls, rotting diapers and doors and drawers, empty beer cans, that sort of thing.” Jason also testified that he had received “repeated” calls from James’s residential facility concerning James’s alcohol consumption and other behavioral issues, and that James was moved to a different residential facility better equipped to deal with him. Finally, Jason testified that he did not believe that James has a desire to quit drinking and that based on his pattern of drinking, James presented a risk of damage to himself.

¶8 Miloch testified that it was her understanding that during the period of James’s protective placement, James had continued to consume alcohol. Miloch testified that James’s prior residential facility felt that they were no longer able to meet James’s needs, and James was moved to a new facility with more supervision. Miloch also testified that James suffered from problems with his memory. She testified that she had “met with [James] and talked to him on the phone on many, many, many occasions and [James] does not remember who [she is] or what [her] role is ... or who he has talked to in the past.” She testified that James “continues to ask the same questions day after day” and it was her opinion

that James does not understand or remember what he is asked. Miloch testified that she did not believe that James would be able to safely reside in the community because she did not believe that he would accept support.

¶9 Following the hearing, the circuit court determined that continued protective placement of James was “necessary and appropriate.” The court found that the evidence showed that James was diagnosed with treatable alcohol dementia. The court found that the diagnosis was based on collateral information, which was not reviewed by Waltonen and did not factor into his evaluation of James. The court further found that testimony indicated that James suffers from both short-term and long-term memory loss, is unable to care for himself or seek assistance if needed, and is unable to stop drinking. James appeals.

## DISCUSSION

¶10 James challenges the circuit court’s order continuing his protective placement. He asserts that the County failed to offer sufficient evidence to meet its burden of proving that he continues to need protective placement.

¶11 Our review of a circuit court’s decision to issue a protective placement order presents a mixed question of fact and law. This court will uphold the circuit court’s factual findings regarding the elements for protective placement unless the findings are clearly erroneous. WIS. STAT. § 805.17(2). However, whether that evidence supports the legal standard for protective placement is a question of law, which is reviewed de novo. *Walworth Cnty. v. Therese B.*, 2003 WI App 223, ¶21, 267 Wis. 2d 310, 671 N.W.2d 377.

¶12 Before an individual may be protectively placed, the petitioner must prove the following, by clear and convincing evidence: (1) the individual has a

primary need for residential care and custody; (2) the individual has been deemed incompetent by a circuit court; (3) as a result of his or her impairment, the individual is so totally incapable of providing for his or her own care and custody as to create a substantial risk of serious harm to himself or herself or others; and (4) the disability is permanent or likely to be permanent. *See* WIS. STAT. §§ 55.08(1) and 55.10(4)(d). An individual who is subject to a protective placement order is entitled to have that status reviewed annually to determine whether the individual continues to meet the requirements for protective placement. *See* WIS. STAT. § 55.18; *see State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 84-85, 362 N.W.2d 104 (1985). Section 55.18(3)(d), which governs annual reviews of protective placement orders, states that a due process hearing must meet all of the requirements of WIS. STAT. § 55.10(4), which in turn states that the court must again find by clear and convincing evidence each of the four elements enumerated above. *See* § 55.10(4)(d).

¶13 On appeal, James’s challenge of the sufficiency of the evidence supporting the circuit court’s order of continued protective placement is limited to the fourth element—whether he suffers from a disability that is permanent or likely to be permanent. James argues that Waltonen was unable to testify that he suffered from a permanent or likely to be permanent disability, and that neither of the other witnesses established that he did and, therefore, the evidence failed to establish the fourth element for continued protective placement. I agree.

¶14 We have stated that in order to meet its burden of proof for protective placement, the government “must present a witness who is qualified by experience, training and independent knowledge of [the individual’s] mental health to give a medical or psychological opinion on each of these elements.”

*Therese B.*, 267 Wis. 2d 310, ¶13 (citing *R.S. v. Milwaukee Cnty.*, 162 Wis. 2d 197, 210 n.10, 470 N.W.2d 260 (1991)).

¶15 At the hearing, Waltonen testified that given the information he was provided, he was unable to testify that James suffers from a permanent or likely to be permanent disability. Waltonen acknowledged that he was not provided information concerning James's history of substance abuse or his prior diagnosis of alcohol-induced dementia. However, the burden lay with the County to present a qualified witness to provide a medical or psychological opinion as to the permanence of any disability James may suffer. Although James was previously diagnosed with alcohol-induced dementia, no medical or psychological opinion was offered at trial from Waltonen that James continues to suffer from that ailment.

¶16 The County argues that even if Waltonen's testimony is disregarded, the evidence was sufficient to support the court's finding that James suffers from a permanent, or likely to be permanent, disability. The County asserts that the testimony of Jason and Miloch in conjunction with the report prepared by Sersch, demonstrates that James continues to suffer from ongoing symptoms of alcohol-induced dementia. I am not persuaded. Although the testimony of Jason and Miloch established that James continues to drink alcohol and is likely to continue to do so in the future, and although Miloch's testimony established that James suffers from problems with his memory, neither individual gave a medical or psychological opinion that James's alcohol-induced dementia was likely to be permanent. Furthermore, although Sersch stated in his report that James suffers from alcohol-induced dementia, lacks the capacity to provide sufficient care for himself and is in need of protective placement, Sersch's report does not indicate that James's disability is permanent or likely to be permanent.

¶17 Accordingly, I conclude that on review of James's protective placement, the County failed to prove by clear and convincing evidence that James suffers from a permanent, or likely to be permanent, disability. Accordingly, I reverse the circuit court's order of protective placement.

*By the Court.*—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

